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Supreme Court of the United States

OCTOBER TERM, 1960

No. 673

EARL CHAVIS, PETITIONER,

versus

E. I. DuPONT DE NEMOURS AND COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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E. I. DuPONT DE NEMOURS AND COMPANY, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case November 14, 1960.

OPINION BELOW

The opinion of the District Court is not reported. The opinion of the Court of Appeals (App. p. 19) is not yet reported. (Now reported in 283 F 2d 929)

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1960. Petition for rehearing was denied on December 23, 1960. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. In a common law action for negligence against a defendant who by its answer raises the affirmative defense that it is a statutory employer of the plaintiff within the meaning of the South Carolina Workmen's Compensation Act, may a District Judge decide issues raised by this defense and grant summary judgment in favor of the defendant where the evidence produced thereon presents, in accordance with the test laid down by South Carolina law and as enunciated by a prior decision of this Court, a genuine disputed question of fact?

2. May the right of trial by jury be obstructed and the ultimate determination of issues of fact by the jury be interfered with by a Court of Appeals' interpretation of local law where such interpretation is baseless, without logical foundation, is contrary to local statutory law and rules of statutory construction, and is in direct conflict with the decisions of the highest Court of the state involved and a prior decision of this Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are: Amendment VII of the United States Constitution and the Workmen's Compensation Act of South Carolina, Title 72, Sections 111-116 and 121 of the 1952 Code of Laws for South Carolina. They are printed in the Appendix, *infra*, pp. 29-31.

STATEMENT

Petitioner, a resident of South Carolina, brought the instant common law action against respondent, E. I. du Pont de Nemours and Company, a Delaware corporation, to recover damages for negligence in causing petitioner to fall from a pole on which he was working, as the result of

which he sustained serious injuries, severing his spinal cord, which rendered him a paraplegic.

At the time of his injury petitioner was working at the premises of the Savannah River Atomic Energy Plant in South Carolina owned by the United States Government.

The Government, through the Atomic Energy Commission, had engaged the respondent duPont, an independent contractor, under a written contract, to construct its Atomic Energy Plant at the Savannah River in South Carolina. Thereafter, the respondent duPont engaged Miller & Dunn Electric Company, an independent electrical contractor, under a written contract, to perform, *inter alia*, the work of erecting and dismantling temporary power lines on the premises; and at the time of his injury petitioner was engaged in performing this work as an employee of Miller & Dunn Electric Company.

Respondent filed an answer to the complaint in which it alleged, *inter alia*, as an affirmative defense "that Miller & Dunn were performing a part of the trade, business or occupation of duPont," and thus respondent was a statutory employer under Section 72-111 of the South Carolina Workmen's Compensation Act (*infra*, p. 29) and by reason thereof was immunized from common law liability by Section 72-121 of the Act (*infra*, p. 31).

Consequently, petitioner propounded an Interrogatory to respondent which, according to South Carolina law as interpreted by the Court of Appeals for the Fourth Circuit and this Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 529-530, is not only relevant but also crucial in determining the issue of whether the work being performed by a subcontractor is a part of the trade, business or occupation of the alleged statutory employer claiming immunity from common law liability.

Respondent answered this Interrogatory by stating that its direct employees did not "perform the work that is the same or similar to the work which was being performed by Miller & Dunn Electric Company insofar as to the erection, maintenance and dismantling of temporary power lines is concerned,"—the work which Miller & Dunn Electric Company was performing through its employee, the petitioner, at the time of his injury. (*infra*, p. 26.)

Respondent also answered another Interrogatory by stating that respondent's work which it was engaged to perform for the Atomic Energy Commission was a part of the trade, business or occupation of the Atomic Energy Commission of the United States Government. (*infra*, p. 26.)

Thereafter, respondent moved for summary judgment in its favor, its motion being predicated and resting upon its contention that respondent was a statutory employer under Section 72-111 of the South Carolina Workmen's Compensation Act, and therefore under the exclusive remedy section, 72-121, of the Act, it was immunized from common law liability.[1]

Notwithstanding the factual dispute made by the evidence of respondent's answers to Interrogatories dealing with the crucial issue raised by the affirmative defense set up in respondent's answer, to wit, whether the work being performed by Miller & Dunn was a part of the trade, business or occupation of respondent duPont, the District Judge undertook to decide this factual issue and concluded

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[1] Section 72-112 (*infra*, p. 30) cannot be applied to hold that respondent is a statutory employer because this section is applicable only under circumstances where the work of the contractor is *not* part of the trade, business or occupation of the person who engages him to perform the work; whereas, in the instant case the work of the contractor, respondent duPont, *is* part of the trade, business and occupation of the Atomic Energy Commission which engaged respondent to perform the work, as appears from respondent's answer to Petitioner's Interrogatory No. 5.

that respondent was a statutory employer of petitioner and thus immune from common law liability for tort; and therefore granted respondent's motion for summary judgment.

Upon appeal, the Court of Appeals, in affirming the summary judgment of the District Court, held that respondent duPont was embraced by the South Carolina Workmen's Compensation Act relating to statutory employers and was therefore immune from common law liability to petitioner by reason of the exclusive remedy section, 71-121, of the Act.

Although not expressly stated in the opinion of the Court below, it is clear that the Court below could not have relied upon the application of Section 72-112 of the Act to hold that respondent was a statutory employer because this Section applies only under circumstances where the work of the statutory employer "is **not** a part of the trade, business or occupation" of the person who engages him to do the work, and in the case at bar this circumstance was not present, as appears from the answer of respondent to petitioner's Interrogatory No. 5. The only other section of the Act which could apply to hold one who is not an immediate employer of the injured workman a statutory employer subject to liability for workmen's compensation benefits, and upon which reliance could possibly have been placed by the Court below, is Section 72-111 of the Act. This Section requires for its application (1) that the employer be a person referred to as "owner" and (2) that the work which the "owner" engaged an independent contractor to perform be a part of the owner's trade, business or occupation.

Notwithstanding the requirements of Section 72-111 for its application as expressed by the plain wording thereof, the Court below, in concluding that respondent, although

not an "owner," may be a statutory employer, extended the application of the statute by adding words thereto to include respondent thereunder.

However, the Court below did not stop there in construing the statute and hold, as required by the decision of this Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, that the evidence of record, viz.: that respondent's direct employees did not perform work which was the same or similar to the work being performed by petitioner at the time of his injury, presented a factual question determinable by a jury as to whether petitioner's work at the time of his injury was a part of respondent's trade, business or occupation.

Instead, the Court below, recognizing the impact of the decision of this Court in *Byrd v. Blue Ridge, supra*, sought to justify its avoidance by proceeding further to construe the statute, although the language of the statute is so clear and unambiguous that there is no room for statutory construction. The Court below concluded that since respondent duPont was not an "owner," but rather a "contractor" it was immaterial whether the petitioner at the time of his injury was performing work which was "restricted to the scope of" respondent's business, or as expressed by the statute, was a part of the trade, business or occupation of respondent.

However, the Court below, in its attempt to avoid the application of *Byrd v. Blue Ridge, supra*, clearly violated applicable South Carolina law and rules of statutory construction. Firstly, it undertook to construe a statute which by the plain wording thereof left no room for statutory construction. Secondly, the Court below, in effect, struck from the statute words which manifestly demand for its application that the work of the injured employee be a part of the trade, business or occupation of the statutory

employer, and thereby construed the statute in such a manner as to defeat the very purpose for its enactment, to wit, not to relieve employers from common law liability where the work performed by injured workmen is **not within the scope of the employers' business,** but, on the contrary, to relieve employers from common law liability only where the work of the injured workmen is within the scope of the employers' business and under such circumstances to impose upon such employers liability for the payment of workmen's compensation benefits to the injured employees.

Petition for rehearing was filed but was denied by the Court below on December 23, 1960.

REASONS FOR GRANTING THE WRIT

1. **The decision herein is not in accordance with the applicable decision of this court:** The decision in the Court below is in direct conflict with the holding by this Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, that, in a diversity action brought in the Federal Court under common law for tort against a defendant who sets up the defense of statutory employer under Section 72-111 of the South Carolina Workmen's Compensation Act, the factual issue of whether such defendant is a statutory employer, judged on evidence which disputes that direct employees of the defendant perform work that is the same or similar to the work which the immediate employer of the injured employee performs, is for the jury and not the judge to decide, notwithstanding that the rule applied by the South Carolina state courts requires this issue to be decided by the judge and not the jury.

The issue raised under this heading involves an important question of federal procedural law and appellate review on which the Court below has so far sanctioned a departure by the lower Court from the accepted and usual

course of judicial proceedings as to call for the exercise of this Court's power of supervision.

2. **The action of the Court below constitutes an invasion of the province of the jury**: The Court below, in affirming the summary judgment, firstly assumed that respondent, an intermediate contractor, although not a person referred to as an "owner" under Section 72-111 of the Act, may qualify as a statutory employer thereunder despite the clear language of this statute which limits it only to a person referred to as "owner"; and secondly, undertook to exercise the power to decide the factual issue of whether respondent did in fact qualify as a statutory employer, and, in so doing, reached a factual finding that respondent was a statutory employer of petitioner in the instant case.

Petitioner challenges both the assumption and the power of the Court below. He submits that the Court below, in holding that respondent may qualify as a statutory employer, not only construed the South Carolina Workmen's Compensation Act contrary to applicable state law, which will be treated *infra*, but also that its action in concluding that respondent was in fact a statutory employer of petitioner herein deprives the petitioner of his right to trial by jury under the Seventh Amendment to the Constitution of the United States and is in direct conflict with the ruling of this Court in *Byrd v. Blue Ridge, supra.*

The record shows that the direct employees of respondent did not perform work that is the same or similar to the work which was being performed by petitioner's immediate employer, Miller & Dunn Electric Company, as appears from respondent's answer to petitioner's Interrogatory No. 6. That this answer is material on the crucial question as to whether the work being performed by Miller & Dunn Electric Company is part of the trade, business or occupation of respondent, which is determinative of its

status as a statutory employer, is clear from the language of this Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 529-530, where this Court stated:

> "Relying on the decisions of the Supreme Court of South Carolina, among others, in *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825, and *Bozeman v. Pacific Mills*, 193 S. C. 479, 8 S. E. (2d) 878, the Court of Appeals held that the statute granted respondent immunity from the action if the proofs established that the respondent's own crews had constructed lines and substations which, like the work contracted to the petitioner's employer, were necessary for the distribution of the electric power which the respondent was in the business of selling. We ordinarily accept the interpretation of local law by the Court of Appeals; cf. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 534, 69 S. Ct. 1233, 93 L. Ed. 1520, and do so readily here since neither party now disputes the interpretation."

Under the foregoing record and the applicable law the question of whether respondent was a statutory employer of petitioner presented, at the least, a factual issue for the determination of a jury, and may not be decided by a district judge in the Federal Court on a motion for summary judgment. This Court so held in cases factually similar to the instant one, *Byrd v. Blue Ridge, supra*, and *Magenau v. Aetna Freight Lines, Inc.*, 360 U. S. 273.

Therefore, it is submitted that the Court below, by deciding the factual question material to the issue of whether respondent was a statutory employer, invaded the province of the jury, in violation of petitioner's right under the Seventh Amendment to the United States Constitution and acted in conflict with the prior decision of this Court in *Byrd v. Blue Ridge, supra.*

3. **The decision of the Court below is in direct conflict with South Carolina law and rules of statutory con-**

struction on an important question affecting a large segment of industry and workers in South Carolina: The Court below, in concluding that respondent duPont, even though not an "owner," may qualify as a statutory employer under Section 72-111 of the South Carolina Workmen's Compensation Act and then further concluding that respondent in fact did qualify as a statutory employer regardless of whether the work being performed by petitioner at the time of his injury was within the scope of respondent's business, decided the case in a way in direct conflict with the South Carolina decisions, statutory law and rules of statutory construction.

Section 72-111 of the Act, obviously the only Section upon which the Court below could possibly have relied for its holding, expressly limits in plain, clear and unequivocal language the inclusion of a statutory employer thereunder, to a person referred to therein as "owner." It further circumscribes or limits the liability of the owner for the payment of workmen's compensation benefits to work which is "a part of his trade, business or occupation"—*Marchbanks v. Duke Power Company*, 190 S. C. 336, 2 S. E. (2d) 825.

From the plain wording of the statute it is clear that the statute was not intended to relieve employers from liability for their own negligence to injured workmen engaged in the performance of work outside the scope of such employer's business, or as more aptly expressed by the Fourth Circuit in *Sears, Roebuck & Co. v. Wallace*, 172 F. (2d) 802, 810:

> "The statute was not intended to relieve employers from liability for their own negligence which causes injury to employees of independent contractors engaged in the performance of work for employers **outside the scope of the latter's occupation.**" (Emphasis added.)

On the contrary, the statute was intended to prevent employers from escaping liability for the payment of workmen's compensation benefits by doing through independent contractors work within the scope of their business, that is, work which they would otherwise do through direct employees or, as expressed by the South Carolina Supreme Court in *Marchbanks v. Duke Power Company*, 190 S. C. 336, 2 S. E. (2d) 825:

> "• • • to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do through direct employees."

and as further expressed in the later South Carolina case of *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. S. E. (2d) 566:

> "It was pointed out that the purpose of the statute is to extend the benefits of Workmen's Compensation to workmen who otherwise would not be entitled to them. It is a protection of the employees of irresponsible contractors who do not provide Workmen's Compensation coverage for their employees, **and prevents employers from escaping liability by doing through independent contractors what they would otherwise do through their own employees.**" (Emphasis added.)

Notwithstanding the plain and unambiguous language of Section 72-111 which limits a statutory employer to a person referred to as "owner", the Court below, without legislative sanction, held that respondent, although not an "owner", may qualify as a statutory employer immune from common law liability and thus in effect added words to the statute contrary to the holding of the South Carolina Supreme Court that "Where there is no ambiguity, words must not be added to • • • the statute," and in violation of the principle of law applied in South Carolina, as expressed by the maxim "*expressio unius est exclusio*

alterius," Home Building and Loan Association v. City of Spartanburg, 185 S. C. 313, 194 S. E. 139, 142.

When the Court below concluded that the respondent duPont may be embraced as a statutory employer within the meaning of Section 72-111, then, of course, in accordance with the express language of Section 72-111 and the law as enunciated by the South Carolina Supreme Court in *Marchbanks v. Duke Power Company, supra,* and by this Court in *Byrd v. Blue Ridge, supra,* undisputed proof or uncontradicted evidence that the work of Miller & Dunn Electric Company, petitioner's employer, was a part of the trade, business or occupation of respondent duPont was required in order to sustain the summary judgment. The record, however, shows that respondent produced no proof on this point. Moreover, respondent's allegation in its answer on this issue was clearly put in dispute by the evidence of record that respondent's direct employees did not perform the same or similar work that was being performed by Miller & Dunn Electric Company, *Byrd v. Blue Ridge, supra,* as appears from respondent's answer to petitioner's Interrogatory No. 6.

The Court below, however, sought to avoid the application of *Byrd v. Blue Ridge, supra,* by undertaking to further construe Section 72-111 which is plain and unambiguous, and, in so doing, again acted in violation of South Carolina law that "Where the terms of a statute are clear and not ambiguous, there is no room for construction, and courts must apply them according to their literal meaning." *Guery v. Kinsler,* 3 S. C. 423; *Home Building and Loan Association v. City of Spartanburg, supra.*

Then, the Court below, in construing the statute, held that liability of respondent for workmen's compensation benefits and consequent immunity from common law liability was not "restricted to the scope of" respondent's busi-

ness, or, in other words, was not restricted to work which is a part of respondent's trade, business or occupation. Thus, the Court in effect struck or took from the statute the words of limitation that the work of the statutory employer must be a part of his trade, business or occupation. In so construing the statute, the Court acted in direct conflict with the South Carolina principle of law that "Where there is no ambiguity, words must not be * * * taken from the statute." *Home Building and Loan Association v. City of Spartanburg, supra.*

Additionally, as heretofore pointed out, the Court below by taking words from the statute construed it in such a manner as to defeat the very purpose for which it was enacted, *Marchbanks v. Duke Power Company, supra,* and accomplish a purpose which was clearly not intended, *Sears, Roebuck v. Wallace,* 172 F. (2d) 802, 810.

The construction of the statute by the Court below would clearly accomplish the purpose of relieving employers from liability for negligence to injured workmen of independent contractors engaged in work which is outside the scope of such employer's business, a purpose clearly not intended by the statute; and would defeat the purpose for which the statute was enacted, that is, to render employers liable for the payment of workmen's compensation benefits "by doing through independent contractors what they would otherwise do through direct employees."

In construing the statute to defeat the purpose for which it was enacted, the Court below clearly violated the fundamental principle of law enunciated by the South Carolina Supreme Court in *Home Building and Loan Association v. City of Spartanburg, supra,* that "the books are so full of cases holding that the intention of the legislative body is the first rule of construction of statutes that a citation of them is wholly unnecessary. Full effect must be

given to each section, and the words must be given their plain meaning."

It is thus manifest that the interpretation by the Court of Appeals is not only patently baseless and without logical foundation but also is contrary to the local statutory law and rules of statutory interpretation, and is in direct conflict with the decisions of the highest Court of the state.

The opinion of the Court below cited *Smith v. Fulmer*, 198 S. C. 91, 15 S. E. (2d) 681, as applicable here. It must be remembered, however, that, as stated by the South Carolina Supreme Court in the cited case, "whether the work in a given case falls within the designation of the statute • • • is in each case largely a question of degree and of fact," and that under the state rule this question is determinable by the Court, as distinguished from the federal rule settled by *Byrd v. Blue Ridge, supra*, that such factual issue is for the jury. Moreover, *Smith v. Fulmer, supra*, dealt with a statute which does not contain the phrase of Section 72-111 "which is a part of his (statutory employer) trade, business or occupation." It is therefore respectfully submitted that *Smith v. Fulmer, supra*, has no controlling effect here to deprive the petitioner of his right to a jury trial.

Petitioner is aware of the rule that this Court ordinarily accepts the determination of local law by the Court of Appeals, *Ragan v. Merchants Transfer and Warehouse Company*, 337 U. S. 530. But he respectfully submits that, where the interpretation of the local law is baseless, without logical foundation, contrary to local statutory law and rules of statutory construction, and is in direct conflict with the decisions of the highest Court of the state, as heretofore pointed out, this Court, in the interest of the orderly and fair administration of justice and the protection of the safeguards of the Seventh Amendment, should

not accept such a determination, for the true effect of the Court of Appeals' determination would be to obstruct the enjoyment of the right of trial by jury and interfere with ultimate determination of issues of fact by the jury in violation of the Seventh Amendment, *Ex parte Peterson*, 253 U. S. 300, 310.

The issue raised under this heading involves an important question affecting the right of trial by jury under the Seventh Amendment to the Constitution pertaining to a large segment of industry and workers, which was clearly decided by the Court below in a way in conflict with the applicable state law. In reaching its decision the Court of Appeals has so far departed and sanctioned a departure by the District Judge from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari, should reverse the judgment of the Court below and order the Court of Appeals to remand the case to the District Court for trial by jury.

Respectfully submitted,

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DECISION OF COURT OF APPEALS

(Argued October 12, 1960. Decided November 14, 1960.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Henry Hammer (Marshall B. Williams, Sol Blatt, Jr., and Henry H. Edens on brief) for Appellant, and J. Means McFadden (Robinson, McFadden & Moore on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

An injured employee of a subcontractor seeks to maintain a common law action against the general contractor for damages on account of the injury. His theory is that only the owner and the subcontractor were his employers within the meaning of South Carolina's Workmen's Compensation Act. He contends that the general contractor had no duty to compensate him under the Act and, therefore, is not entitled to the Act's protection against common law liabilities.

We think the District Court properly granted the defendant's motion for summary judgment.

In 1950, E. I. du Pont de Nemours and Company entered into a contract with the Atomic Energy Commission, by which du Pont, under the close supervision of the Commission and subject to its instructions, undertook the design, construction and operation of unspecified facilities in contemplation of the production of thermonuclear weapons. The resulting facilities, located in South Carolina, are known, collectively, as the Savannah River Plant. The contract between du Pont and the A. E. C. and the resulting relationship between the two were considered and summarized in some detail in *United States v. Livingston*, D. C., E. D., S. C. 179 F. Supp. 9, affirmed sub. nom. *Livingston v. United States*, 364 U. S. 281, S.Ct. , L.Ed.

By a supplement to the original letter contract, du Pont represented it had obtained workmen's compensation insurance protecting it and all cost-plus-a-fixed-fee subcontractors engaged in the work at the plant site.

By a contract with du Pont, Miller and Dunn Electric Companies undertook certain electrical work on the site of the plant. In this contract, du Pont agreed to provide workmen's compensation insurance for the benefit of Miller-Dunn's employees. Under this contract, the plaintiff, with other employees of Miller-Dunn, was engaged in the dismantling of temporary power lines. The plaintiff fell from a pole and was injured. He alleges that du Pont's negligence caused the fall.

The plaintiff has received compensation for his injuries under South Carolina's Workmen's Compensation Act from du Pont's workmen's compensation insurance carrier. He disclaimed realization of the identity of the payor of his compensation, and brought this action at common law against du Pont.

The plaintiff's objection to the summary judgment against him is founded upon an answer to an interrogatory which concedes that du Pont's work at the Savannah River Plant is "part of the trade, business and occupation" of the Atomic Energy Commission. Whether this may be properly construed as leaving open the question whether the A. E. C. was in the business of dismantling temporary power lines[1] within the meaning of the state statute, we need not consider. Whatever the scope of the business of A. E. C., du Pont, under the statute, was a statutory employer of the plaintiff, responsible for compensation to him under the Act and protected by the Act's immunity from common law actions.

South Carolina's Workmen's Compensation Act[2] contained in § 19, quoted in the margin,[3] the provisions around

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[1] See *Blue Ridge Rural Electric Cooperative v. Byrd*, 4 Cir., 238 F. (2d) 346; *Byrd v. Blue Ridge Cooperative*, 356 U. S. 525.

[2] 39 Stat. 1231.

[3] "§ 19. Rights of Employees of Sub-Contractors—Rights and Liability of Contractor and Sub-Contractors.—(a) Where any person (in this section referred to as 'owner'), undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if the workman had been immediately employed by him.

which this controversy revolves. In the Code of Laws of South Carolina, 1952, § 19 of the original Act is subdivided into several different sections.

Section 72-111 of the 1952 Code contains the provision that when an owner undertakes work which is part of his business and contracts with another, designated a "subcontractor," for the other to perform all or part of the work, the owner is liable for workmen's compensation to the employees of the "subcontractor." Section 72-112 makes a contractor who contracts to do work for an owner, which is not part of the owner's business, responsible for workmen's compensation to the employees of his subcontractors. By § 72-113, the benefits of §§ 72-111 and 112 are extended to the employees of sub-subcontractors. Section 72-115 pro-

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"Where any person (in this section referred to as 'contractor') contracts to perform or execute any work for another person, which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section referred to as 'subcontractor') for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any workman employed in the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him.

"Where the subcontractor, as the term is hereinbefore used, in turn contracts with still another person (in this section also referred to as 'subcontractor') for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor, as those terms are hereinbefore used, shall be the same as the liability imposed by the preceding paragraphs of this subsection.

"Where compensation is claimed from or proceedings are taken against the owner or contractor, as those terms are hereinbefore used, then, in the application of this Act reference to the owner or contractor shall be substituted for reference to the subcontractor, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed.

"(b) Where the principal contractor is liable to pay compensation under this section, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workman independently of this section or form [sic] an intermediate contractor, and have a cause of action therefor.

"(c) Nothing in this section shall be construed as preventing a workman from recovering compensation under this Act from a subcontractor instead of from the principal contractor, but he shall not collect from both.

"(d) A principal contractor when sued by a workman of a subcontractor shall have the right to call in that subcontractor or any intermediate contractor or contractors as defendant or co-defendant."

vides that when the "principal contractor" is liable for compensation under §§ 72-116, he is entitled to indemnity from anyone otherwise responsible for compensation for the injured employee "or from an intermediate contractor," and may maintain an action for the indemnity. Section 72-115 also gives the "principal contractor" the right to call in the immediate employer or any intermediate contractor as defendant or co-defendant in the compensation action. Section 72-121 makes the statutory remedies exclusive of all other rights and remedies against an employer.

The plaintiff, reading § 72-112 narrowly, contends a general contractor is responsible for compensation of employees of subcontractors only if engaged in work which is not the business of the owner. Indeed, it is true that § 72-111 applies only if the work done is the business of the owner and § 72-112 only if it is not. It is evident, however, that once the highest responsible person is determined by reference to §§ 72-111 and 112, every intermediate contractor and subcontractor under him shoulders the same, indeed the primary, obligation, for the "principal contractor" is entitled to indemnity from him and to call him in to defend the compensation claim.

In construing almost identical provisions of Virginia's Workmen's Compensation Act, the Supreme Court of Appeals of that State has said:[4]

> "The section makes the owner liable if the workman, no matter how far down the line, is doing work which the owner has undertaken to perform as a part of his own trade, business or occupation. But if the work which the workman is doing is not a part of the trade, business or occupation of the owner, and the owner contracts with a contractor to do it, the contractor is liable to the workman, but not the owner. . . .
>
> "It clearly appears to be the purpose of section 20(a) to bring within the operation of the Compensation Act all persons engaged in any work that is a part of the trade, business or occupation of the original party who undertakes as owner, or contracts as con-

[4] *Sykes v. Stone & Webster Engineering Corporation*, 186 Va. 116, 41 S. E. (2d) 469, 472.

tractor, to perform that work, and to make liable to every employe engaged in that work every such owner, or contractor, and subcontractor above such employe. But when the employe reaches an employer in the ascending scale, of whose trade, business or occupation the work being performed by the employe is not a part, then that employer is not liable to that employe for compensation under section 20(a). At that point paragraph 5 of section 12 intervenes and the employe's right of action at common law is preserved."

The plaintiff's theory loses consistency as soon as §§ 72-111 and 112 are read in connection with other provisions of the Act. The indemnification provisions make it plain that the primary obligation is that of the immediate employer, next of an intermediate contractor, only lastly that of the § 72-111 or § 72-112 employer. It can hardly be said that the Act imposes no duties upon an intermediate employer when it clearly places upon him an absolute duty of indemnification of the highest level employer.

Moreover, § 72-116 specifically authorizes an injured employee to proceed against a subcontractor, and § 72-111 designates du Pont a subcontractor if that section is applicable.

It is perhaps significant that the indemnification and immunity sections, refer to the "principal contractor" and to the "employer," terms which may not be restricted to those employer-contractors who fall within the definitions of §§ 72-111 and 112. Courts have generally construed "principal contractor," as used in similar statutes, to include intermediate contractors.[5] The term "employer" as used in the immunity provision of § 72-121, was clearly intended to include others than the immediate employer. This the Supreme Court of South Carolina has held expressly.[6] We think it must include every person whom the Act makes responsible for compensation.

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[5] *Kegley v. Vulcan Rail & Const. Co.*, 203 Md. 476, 101 A. (2d) 822; *Palumbo v. George A. Fuller Co.*, 99 Conn. 221, 122 Atl. 63; *Pascoal v. Mortenson*, 109 Conn. 39, 147 Atl. 149; *Bogoratt v. Pratt & Whitney Aircraft Co.*, 114 Conn. 126, 157 Atl. 860.

[6] *Younginer v. J. A. Jones Const. Co.*, 215 S. C. 135, 54 S. E. (2d) 545; *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825.

This precise question seems never to have been raised in the Supreme Court of South Carolina. If it may be said to be present here, it certainly was present, however, in *Smith v. Fulmer*, 198 S. C. 91, 15 S. E. (2d) 681, where the general contractor was engaged in the construction of a bridge for the State Highway Department. If the A. E. C. is in the business of dismantling temporary power lines which had been used in the construction of facilities for it, the Highway Department is in the business of building highway bridges. While there appears to have been no effort there to characterize the general contractor as a "subcontractor" under the provisions of § 72-111, the statement of the South Carolina Supreme Court of its approach to the problem is applicable here. It said:

> "It seems to us that the true test is: Was the employee doing something for the subcontractor which bore some reasonably direct relation to the performance 'of the work undertaken' by the contractor? The subcontractor, Sherard, simply stepped into the shoes of Fulmer with reference to the work of making the fills and laying the concrete paving. We think the admitted facts demonstrate that Smith, the deceased employee, was employed in the work which Sherard had agreed to perform for Fulmer, and hence under the terms of the statute Fulmer is liable just as if Smith had been immediately employed by him, for he was actually doing Fulmer's work, that is to say, he was actually doing something which was essentially related to the fulfillment of the contract made by Fulmer with the State Highway Department."

So here, with respect to this work, Miller and Dunn stepped into du Pont's shoes. Their employees were doing du Pont's work and du Pont was responsible under the Act for compensation of those employees of Miller and Dunn who were injured in performance of the work.

The plaintiff makes the further point that since du Pont subcontracted all of the dismantling of temporary power lines, that work was not du Pont's work or business. The point is inconsistent with the plaintiff's primary theory that such work was the business of A. E. C. The point is

immaterial, however, for only the liability of an owner is restricted to the scope of his business. The Act contains no express limitation upon the liabilities of contractors. Whatever a contractor engages to do is his work whether he executes it through employees immediately or remotely employed by him. If in other circumstances, therefore, some limitation to the scope of the contractor's work may be implicit in the affirmative provisions of the Act, it has no application here.

Affirmed.

PETITION FOR REHEARING

The Petitioner prays that this Court grant a re-hearing of its decision of November 14, 1960, affirming the summary judgment of the District Court in favor of the Defendant and against the Plaintiff, upon the following grounds:

1. The decision of this Court holding that the exclusive remedy provision of Section 72-121 of the South Carolina Workmen's Compensation Act immunized Defendant duPont from common law liability for tort to Plaintiff Chavis was obviously based upon its conclusion that Defendant duPont was a statutory employer of Plaintiff Chavis under the provisions of Section 72-111[1] and Section 72-113 of the South Carolina Workmen's Compensation Act.

In reaching this conclusion it is respectfully submitted that this Court must have either overlooked or disregarded the teaching of the decision of the United States Supreme Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, which, in treating the very same section of the South Carolina Workmen's Compensation Act involved herein, held that the factual issue of whether the work of the injured employee's immediate employer is part of the trade, business or occupation of the person claiming to be a statutory employer under Section 72-111 of the Act,

[1] Section 72-112, which requires for its application that the work of the alleged statutory employer must *not* be a part of the trade, business or occupation of the person with whom it contracts for the performance of such work, cannot apply in the case at bar because, according to Defendant duPont's answer to Plaintiff's Interrogatory No. 5, the work of Defendant duPont *is* a part of the trade, business or occupation of the Atomic Energy Commission with whom it contracted for the performance of the work.

proof of which being a necessary prerequisite for the application of such section,[2] is determinable by a jury in a Federal court, notwithstanding that such issue when tried in the State Court is determinable by the trial judge.

In this connection it is respectfully pointed out that the record is not only void of evidence that the work of Plaintiff Chavis or his immediate employer, Miller-Dunn Electric Company, in dismantling the temporary power lines was part of the trade, business and occupation of Defendant duPont or the Atomic Energy Commission with whom Defendant duPont entered into a contract for the performance of work, but, on the contrary, the record shows that in accordance with the test applicable in South Carolina, as enunciated by the United States Supreme Court in *Byrd v. Blue Ridge, supra*, at pages 529-530, the proofs established that the Defendant's own crews or direct employees did not perform work that is the same or similar to the work which was being performed by Plaintiff Chavis and his immediate employer, Miller-Dunn Electric Company, and thus such work was not part of the trade, business or occupation of the Defendant duPont or the Atomic Energy Commission, as appears from the following answers of Defendant duPont to Plaintiff's Interrogatories:

> "Interrogatory 5. Is the work of the defendant part of the trade, business and occupation of the Atomic Energy Commission of the United States Government?
>
> Answer: Yes, to the best of our knowledge.
>
> Interrogatory 6. Did the direct employees of the defendant perform work that is the same or similar to the work which was being performed by Miller and Dunn Electric Company?
>
> Answer: Insofar as the erection, maintenance and dismantling of temporary power lines is concerned, no."

Consequently, it is submitted that, at the least, a factual question was presented as to whether the work of Chavis and his immediate employer, Miller-Dunn Electric Company, in dismantling the temporary power lines, was part of the trade, business or occupation of the Defendant

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[2] *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825.

duPont; and thus it follows that the affirmance by this Court of the summary judgment deprives the Plaintiff of his constitutional right of trial by jury and is in direct conflict with the mandate of the United States Supreme Court in *Byrd v. Blue Ridge, supra.*

2. The decision of this Court was also based upon its conclusion that Section 72-111 was applicable to include an intermediate contractor, notwithstanding that the express wording of the statute is limited to a person referred to as "owner." In reaching this conclusion it is respectfully submitted that this Court overlooked the maxim "*inclusio unius est exclusio alterius*," that where a statute specifies the person upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned, particularly where those not expressly mentioned in the statute are mentioned in other statutes.

3. This Court, in reaching its conclusion that Defendant duPont was a statutory employer under Section 72-111 of the Act, determined that duPont was liable in indemnity under Section 72-115 of the Act to the Atomic Energy Commission for compensation benefits that the Atomic Energy Commission could have been held liable to pay to Plaintiff Chavis under Section 72-111 of the Act.

In reaching this determination this Court must have overlooked that before such a determination could be reached it was necessary first to determine that the Atomic Energy Commission could have been held liable for compensation benefits under Section 72-111, but, that in accordance with the evidence and the applicable law herein, the Atomic Energy Commission could not have been held liable for compensation benefits to Plaintiff Chavis because (1) there was no proof that the work of Chavis or his immediate employer, Miller-Dunn Electric Company, was part of the trade, business or occupation of the Atomic Energy Commission; and (2) there was no proof that the Atomic Energy Commission comes within the provisions of the South Carolina Workmen's Compensation Act so as to render it liable for compensation benefits to injured employees.

4. The decision of this Court was also based upon its conclusion that the case of *Sykes v. Stone & Webster Engi-*

neering Corporation, 186 Va. 116, 41 S. E. (2d) 469, was controlling herein to warrant summary judgment. In reaching this conclusion this Court must have overlooked the meaning of the language of the Virginia court quoted in this Court's opinion as follows:

> "But when the employee reaches an employer in the ascending scale, of whose trade, business or occupation the work being performed by the employee is not a part, then that employer is not liable to that employee for compensation under section 20(a). At that point paragraph 5 of section 12 intervenes and the employee's right of action at common law is preserved."

Certainly when Plaintiff Chavis reached the employer, Defendant duPont, in the ascending scale, he reached an employer whose trade, business or occupation, the work being performed by the employee, was not a part; and consequently, at that point, as stated in the *Sykes case*, the employee's right of action at common law is preserved.

For the reasons set forth above and in the Brief filed by appellant it is respectfully urged that a re-hearing be granted, and that upon such re-hearing the judgment of the District Court be reversed.

Respectfully submitted,

MARSHALL B. WILLIAMS,
SOL BLATT, JR.,
HENRY H. EDENS,
HENRY HAMMER,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing Petition for Rehearing is presented and filed in good faith and not for delay.

MARSHALL B. WILLIAMS,
SOL BLATT, JR.,
HENRY H. EDENS,
HENRY HAMMER,
Attorneys for Petitioner.

ORDER DENYING PETITION FOR REHEARING

The Court having heretofore on November 14, 1960 entered its judgment and filed an opinion in the above entitled case and a petition for rehearing having been filed on December 12, 1960;

Now, Therefore, upon consideration of the petition for rehearing,

It is ordered that the petition for rehearing be, and the same hereby is, denied.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit
MORRIS A. SOPER,
United States Circuit Judge
CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge

December 23, 1960.

A true copy,
Teste:

RICHARD M. F. WILLIAMS, JR., Clerk,
U. S. Court of Appeals for the Fourth Circuit.
By: MARGARET L. DAVIS,
Deputy Clerk.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

Title 72, Workmen's Compensation, Code of Laws of South Carolina, 1952.

"Sec. 72-111. LIABILITY OF OWNER TO WORKMEN OF SUBCONTRACTOR.

When any person, in this section and sections 72-113 and 72-114 referred to as "owner," undertakes to perform

or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and sections 72-113 to 72-116 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him."

"Sec. 72-112. LIABILITY OF CONTRACTOR TO WORKMEN OF SUBCONTRACTOR.

When any person, in this section and sections 72-113 to 72-116 referred to as "contractor", contracts to perform or execute any work for another person which is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and sections 72-113 to 72-116 referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any of the work undertaken by such contractor, the contractor shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if that workman had been immediately employed by him."

"Sec. 72-113. LIABILITY OF SUBCONTRACTOR TO WORKMEN OF SUBCONTRACTOR.

When a subcontractor in turn contracts with still another person, in this section and sections 72-114 to 72-116 also referred to as a "subcontractor", for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, the liability of the owner or contractor shall be the same as the liability imposed by sections 72-111 and 72-112."

"Sec. 72-114. CONSTRUCTION WHEN PROCEEDINGS ARE AGAINST OWNER OR CONTRACTOR.

When compensation is claimed from or proceedings are taken against an owner or contractor then, in the application of this Title, reference to the owner or contractor shall be substituted for reference to the subcontractor, except

that the amount of compensation shall be calculated with reference to the earnings of the workman under the subcontractor by whom he is immediately employed."

"Sec. 72-115. INDEMNITY OF PRINCIPAL FROM SUBCONTRACTOR.

When the principal contractor is liable to pay compensation under any of sections 72-111 to 72-116, he shall be entitled to indemnity from any person who would have been liable to pay compensation to the workmen independently of such sections or from an intermediate contractor, and have a cause of action therefor.

A principal contractor when sued by a workman of a subcontractor shall have the right to call in that subcontractor or any intermediate contractor or contractors as defendant or co-defendant."

"Sec. 72-116. WORKMAN MAY RECOVER FROM SUBCONTRACTOR.

Nothing in sections 72-111 to 72-116 shall be construed as preventing a workman from recovering compensation under this Title from a subcontractor instead of from the principal contractor but he shall not collect from both."

"Sec. 72-121. EMPLOYEE'S RIGHTS UNDER TITLE EXCLUDE ALL OTHERS AGAINST EMPLOYER.

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."